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In the Supreme Court of the United States

OCTOBER TERM, 1976

BAYSIDE ENTERPRISES, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Question presented	3
Statement	3
A. The Board's findings of fact	3
B. The Board's decision	9
C. The decision of the court of appeals	10
Summary of argument	10
Argument:	
Truck drivers who transport feed from their employer's mill to independent farms which under contract with the employer raise poultry hatched in his hatchery facilities are employees, rather than agricultural laborers, and thus are covered under the National Labor Relations Act	14
A. Introduction	14
B. The drivers' duties do not constitute practices performed by a farmer as an incident to or in conjunction with his farming operations	16
1. The independent growers, not the Company, raise the poultry on the contract farms	17
a. The division of risk between the grower and the Company indicates that the grower, not the Company, is the farming unit	20
b. The other factors in the relationship between the growers and the Company indicate the growers are independent farmers	25
2. The Company's feed delivery operation is not a subordinate part of its farming operations	30

220-043—76——1

Argument—Continued Page

C. The drivers do not perform work on a farm as an incident to or in conjunction with farming operations within the meaning of the FLSA agricultural exemption ---- 35
1. The delivery of supplies is not work "on a farm" within the agricultural exemption ---- 36
2. The driver's work is not substantially performed "on a farm" ---- 42

Conclusion ---- 44

CITATIONS

Cases:

Abbott Farms, Inc. v. *National Labor Relations Board*, 487 F. 2d 904 ---- 20
Aquaculture Research Corp., 215 NLRB No. 1, 87 LRRM 1496 ----
Bowie v. *Gonzalez*, 117 F. 2d 11 ---- 16
Boyls v. *Wirtz*, 352 F. 2d 63 ---- 38
Calaf v. *Gonzalez*, 127 F. 2d 934 ---- 34
Clinton Foods, Inc., 108 NLRB 85 ---- 42, 43
Elm Spring Farm v. *United States*, 127 F. 2d 920 ---- 21, 23
Etchechoury v. *Avi-Simplot, Inc.*, 93 Idaho 438, 462 P. 2d 737 ---- 15
Farmers Reservoir & Irrigation Co. v. *McComb*, 337 U.S. 755 ---- 11, 15, 16, 36, 40, 41
Fors Farms, Inc. v. *Washington State Employment Security Dept.*, 75 Wash. 2d. 383, 450 P. 2d 973 ---- 19
Hearnsberger v. *Gillespie*, 435 F.2d 926 ---- 43
Hodgson v. *Wittenburg*, 464 F.2d 1219 ---- 43
Holtville Alfalfa Mills v. *Wyatt*, 230 F.2d 398 ---- 33, 38–39
Johnston v. *Cotton Producers Assn.*, 244 F.d 553 ---- 40
Light's Tree Co., 194 NLRB 229 ---- 44
McComb v. *Super-A Fertilizer Works, Inc.*, 165 F. 2d 824 ---- 40
McElrath Poultry Co., Inc., 206 NLRB 354 enforcement denied, 494 F.2d 518 ---- 19, 20
Maneja v. *Waialua Agricultural Co., Ltd.*, 349 U.S. 254 ---- 12, 17, 30, 32, 33
Maplewood Poultry Co. v. *Maine Employment Security Common*, 151 Me. 467, 121 A. 2d 360 ---- 15

Cases—Continued

Page

Mitchell v. *Budd*, 350 U.S. 473 ---- 33
Mitchell v. *Hertzke*, 234 F. 2d 183 ---- 28
Mitchell v. *Hunt*, 263 F. 2d 913 ---- 16, 43
Mitchell v. *Huntsville Wholesale Nurseries, Inc.*, 267 F. 2d 286 ---- 21, 25, 26
National Labor Relations Board v. *Deaton, Inc.*, 502 F. 2d 1221, certiorari denied, 422 U.S. 1047 ---- 27
National Labor Relations Board v. *Kelly Brothers Nurseries, Inc.*, 341, F. 2d 433 ---- 14, 43
National Labor Relations Board v. *Olaa Sugar Co.*, 242 F. 2d 714 on remanded, 118 NLRB 1442 ---- 16, 35, 42, 43
National Labor Relations Board v. *Ryckebosch, Inc.*, 471 F. 2d. 20 ---- 19, 20
National Labor Relations Board v. *Strain Poultry Farms, Inc.*, 405 F. 2d 1025 ---- 19, 20, 21
National Labor Relations Board v. *United Insurance Co.*, 390 U.S. 254 ---- 27
Parks v. *Federal Crop Insurance Corp.*, 146 F. 2d 833 ---- 21, 26
Rutherford Food Corp. v. *McComb*, 331 U.S. 722 ---- 27, 28
Skidmore v. *Swift & Co.*, 323 U.S. 134 ---- 19
Tipton v. *Associated Milk Producers, Inc.*, 398 F. Supp. 743 ---- 39
Tobin v. *Blue Channel Corp.*, 198 F. 2d 245 ---- 43
United States v. *American Trucking Assn.*, 310 U.S. 534 ---- 18
Victor Ryckebosch, Inc., 189 NLRB 40 ---- 20
Vives v. *Serralles*, 145 F. 2d 552 ---- 34
Wabash Radio Corp. v. *Walling*, 162 F. 2d 391 ---- 43
Waldo Rohnert Co. v. *National Labor Relations Board*, 322 F. 2d 48 ---- 16, 20, 26
Wirtz v. *Jackson & Perkins Co.*, 312 F. 2d 48 ---- 21
Wirtz v. *Lyon Flying Service*, 16 WH Cases 414 ---- 42
Wirtz v. *Osceola Farms Co.*, 372 F. 2d 584 ---- 39
Wirtz v. *Ti Ti Peat Humus Co.*, 373 F. 2d 209, certiorari denied, 389 U.S. 834 ---- 40
Wirtz v. *Tyson's Poultry, Inc.*, 355 F. 2d 256 ---- 19, 20, 21
Wirtz v. *Von Carstedt*, 362 F. 2d. 67 ---- 43

Statutes and regulations: Page

Fair Labor Standards Act of 1938, Section 3(f), 52 Stat. 1060, as amended, 29 U.S.C. 203(f) ..... *passim*

Fair Labor Standards Amendments of 1966, Section 203(a), 80 Stat. 833, 29 U.S.C. 213(a) 26, 28

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*):

Section 2(3) 2, 14

Section 8(a)(1) 10

Section 8(a)(5) 10

Social Security Act Amendments of 1939, 53 Stat. 1360, 1377 14

90 Stat. 23 2

42 U.S.C. 410(f) 14

29 C.F.R.:

Section 780.11 43

Section 780.126 ..... 12, 18

Section 780.134 42

Section 780.136 37

Section 780.137 16

Miscellaneous:

81 Cong. Rec. 7653, 7659 (1937) 37

81 Cong. Rec. 7888 (1937) 36, 37

92 Cong. Rec. 6689–6692 (1946) 14

92 Cong. Rec. 9514 (1946) 14

112 Cong. Rec. 20819–20820 (1966) 27

26 Fed. Reg. 10386 17

S. Rep. No. 1487, 89th Cong., 2d Sess. (1966) 27

B. W. Marion and H. B. Arthur, *Dynamic Factors in Vertical Commodity Systems: A Case Study of the Broiler System* (Ohio Agricultural Research and Development Center, 1973) 23

F. D. Reed, *The Maine Poultry Industry: Its Impact, Growth and Competitive Position* (Univ. of Maine, Cooperative Extension Service, Circular 394, Rev. July 1970) 33

U.S.D.A., Packers and Stockyards Administration, *The Broiler Industry: An Economic Study of Structure, Practices and Problems* (1967) 22

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–A5) is reported at 527 F. 2d 436.[1] The Board's decision and order (Pet. App. A7–A22) are reported at 216 NLRB 502.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1975 (Pet. App. A6). The petition for a writ of certiorari was filed on March 8, 1976, and granted on May 19, 1976. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

[1] "Pet. App." refers to the appendix to the petition and "A." to the separate appendix printed pursuant to Rule 36, "Tr." refers to the original transcript of the Board hearing.

STATUTES INVOLVED

1. Section 2(3) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), provides in pertinent part that "The term 'employee' * * * shall not include any individual employed as an agricultural laborer * * *."

2. Since 1946, the appropriation acts for the National Labor Relations Board have regularly carried a rider linking the definition of the term "agricultural employee" to the definition of "agriculture" in Section 3(f) of the Fair Labor Standards Act, 52 Stat. 1060, as amended, 29 U.S.C. Sec. 203(f). The latest such rider (90 Stat. 23) provides in relevant part as follows:

> *Provided,* That no part of this appropriation shall be available to organize or assist in organizing agricultural laborers or used in connection with investigations, hearings, directives, or orders concerning bargaining units composed of agricultural laborers as referred to in section 2(3) of the Act of July 5, 1935 (29 U.S.C. 152), and as amended by the Labor-Management Relations Act, 1947, as amended, and as defined in section 3(f) of the Act of June 25, 1938 (29 U.S.C. 203) * * *.

3. Section 3(f) of the Act of June 25, 1938 (29 U.S.C. 203; the Fair Labor Standards Act) provides in pertinent part, as follows:

> "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities * * * the raising of livestock, bees, fur-bearing animals, or poultry, and any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

QUESTION PRESENTED

Whether truck drivers, who transport feed from their employer's mill to independent farms that are under contract with the employer to raise poultry hatched in his hatchery facilities, are employees, rather than agricultural laborers, and thus covered under the National Labor Relations Act.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. Petitioner Bayside Enterprises, Inc. operates chicken hatcheries and breeding farms near Belfast, Maine, the site of its corporate offices (Pet. App. A–10 to A–11; A. 8–10, 18). As detailed below, Bayside has contracts with 119 independent farmers (hereinafter "the growers") in the area around Belfast for the care and breeding of the chickens from the age of one day until they are ready for processing for market. Petitioner Poultry Processing, Inc., a wholly-owned subsidiary of Bayside, operates a mill at Thorndike, Maine, which supplies feed to the growers as well as to another poultry firm (*infra,*

pp. 6–7).[2] The truck drivers whose status is at issue here haul feed from the mill to the growers. Poultry Processing also owns a processing plant at Belfast, which handles the poultry raised by the growers (Pet. App. A–11 to A–13; A. 8–9).

Employees on the processing plant payroll transport live poultry from the farms to the plant, slaughter and dress the poultry, and ship it out to buyers (Pet. App. A–12; A. 8–9).[3] These employees, including the crews who collect the grown birds from the growers and transport them to the processing plant, are members of a bargaining unit jointly represented by the Amalgamated Meat Cutters Local 385 and the Truck Drivers, Warehousemen and Helpers Union, Local 340.[4] The latter organization (the Union) also represents the feed truck drivers (Pet. App. A–10 to A–11; A. 17, 51).

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[2] The court of appeals affirmed the Board's finding that Bayside and Poultry Processing constitute a single employer, and petitioners are not challenging that finding in this Court (Br. 5 n. 2; cf. 15 n. 9). The term "Company," as used herein, refers to both Bayside and Poultry Processing.

Petitioner Penobscot Poultry Company is a defunct subsidiary of Bayside, providing a trade name for products sold by Poultry Processing (Pet. App. A–12; A. 39).

[3] The plant employees, together with those on the Poultry Processing payroll who work at the feed mill, total over 400 (A. 17). The feed truck drivers are carried on Bayside's payroll (Pet. Br. 5).

[4] In the printing of the appendix, the agreement of petitioners' counsel to a stipulation on this matter was inadvertently omitted. The omitted sentence, which would appear as the last line on A. 51, is "MR. LEVENSON: Yes."

The 119 independent growers who contract with Bayside take chickens from its hatchery and raise them for a specified time, at the end of which they are marketable as broilers, capons, or roasters (Pet. App. A–11, A–23 to A–29, A. 8–11).[5] Bayside retains title to the poultry throughout this operation; title passes to its processing subsidiary when the chickens are cooped for delivery to the processing plant (Pet. App. A–27 A. 9–10). The grower furnishes housing for the flock, water, storage areas for supplies, and the equipment and labor required to raise the chickens to maturity (Pet. App. A–11, A–26).

In addition to supplying the chicks, Bayside provides poultry feed, fuel, and medications, and it makes available the services of four of its employees who periodically check on the health of the flocks and vaccinate the poultry against diseases when this appears necessary (Pet. App. A–11; A. 13, 19–20). These employees are under the supervision of Bayside's broiler department manager, who also determines the composition of the feed supplied to the growers (Pet. App. A–13, A–14; A. 13–14, 40).

Although the contracts between Bayside and the growers guarantee the growers fixed payments per square foot of space occupied by the flocks at given intervals, a grower's total compensation includes a "bonus" determined by the weight of the poultry he

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[5] The contract expressly provides "[t]hat the Grower, his agents and employees shall not be considered to be employees of Bayside for any purpose whatsoever" (Pet. App. A–28).

220-045--76——2

raises to maturity and his production costs in relation to the corresponding figures for the other growers (Pet. App. A–15, A–24 to A–25 to A–28; A. 30, 34). Payments are normally calculated separately for each successive flock placed on a farm, although the terms of each contract remain in effect "for successive flocks as may be placed by mutual agreement" (Pet. App. A–23 to A–27; A. 30).

In addition to contracting with the growers for the raising of poultry, Bayside owns and operates, using its own employees, six breeder farms on which new poultry strains are bred and two hatcheries—the "commercial" hatchery from which chicks are supplied to the growers and a "pedigree" hatchery connected with the breeder farms (Pet. App. A–11; A. 8–11).[6] The feed for flocks on Bayside's own breeder farms and on a few of the contract farms which raise capons and roasters rather than broilers is supplied by the feed mill of Knox-Lincoln Farmer Co-op (KLF) (Pet. App. A–12, n. 2; A. 24–25, 34, 69). The deliveries of feed from this source are generally made by drivers employed by KLF (Pet. App. A–15 to A–16; A. 25, 49).

Most of the growers, however, are supplied with feed from the Company's mill at Thorndike. At the time of the Board hearing, approximately two-thirds of the mill's output went to the contract growers,

[6] The Bayside employees who work on the breeder farms and in the hatcheries are among the approximately 80 persons petitioners identify as employees of Bayside (A. 17, 60–62).

and the remaining one-third was sold to the Fort Halifax Packing Co., an unrelated poultry company which, like Bayside, contracts with independent growers for the raising of poultry to be processed in its processing plant, but which does not have its own feed mill (Pet. App. A–12; A. 5–7, 25–26).[7]

The feed supplied to the contract growers by the Company's mill is delivered to the farms by truck drivers working in two shifts; at the time of the Board hearing there were six such drivers (Pet. App. A–13; A. 44–45). Feeding schedules for the various flocks are made up by the Company's broiler department manager and copies are sent to the dispatcher at the mill, who is responsible for preparing delivery schedules for the farms (Pet. App. A–15; A. 45–46, 59). The dispatcher supervises the feed drivers, and reports to the assistant feed mill manager (Pet. App. A–13; A. 47–48).

The drivers begin their regular duties by loading their trucks with feed at the mill and then weighing the loaded trucks; the drivers are given slips telling them how much of a particular type of feed to deliver to the farm or farms they are scheduled to visit that day (Pet. App. A–14; A. 22, 46, 48, 53). The drivers then drive to the contract farms, where they dis-

[7] Feed deliveries to farms under contract with Fort Halifax are made by an independent hauler, who is paid by Fort Halifax for this service (Pet. App. A–12; A. 6–7). On some occasions, in the event of equipment failure, Bayside has that hauler deliver feed from its mill to some of its contract growers (Pet. App. A–16; A. 35).

charge the feed into bins.[8] If a grower is not present to indicate which bins he wants filled, he may leave a note for the driver (Pet. App. A–14; A. 22, 54). The drivers' responsibilities include putting the proper amounts of feed into the bins, keeping rain out of the bins when unloading in bad weather, spraying their boots and trucks with disinfectant to avoid spreading poultry diseases, and driving their trucks carefully to avoid disturbing the chickens with loud noises and bright reflections from headlights (Pet. App. A–14 to A–15). The drivers wash their trucks after they return to the mill (Pet. App. A–15).

The drivers have no direct contact with the poultry (Pet. App. A–15; A. 32). Less than half their time is spent at the farms, since a small portion is spent at the mill and the remainder is equally divided between driving on the road and unloading at the farms (Pet. App. A–15; A. 43–44). The contract farms are approximately 12 to 15 miles from the mill, and the drivers deliver to three or four of these farms on each work day (Pet. App. A–15; A. 17, 21). The drivers spend between half an hour and an hour on each farm, and they drive approximately 120 miles each day (A. 54, 58).

In addition to making deliveries to the contract farms, the drivers have also on occasion delivered feed from the KLF feed mill to the six breeder farms owned by Bayside, and have transported feed ingredients from Rockland, Maine, and Gloucester, Massachusetts, to the Company's feed mill (Pet. App. A–15 to A–16; A. 25, 32–33, 54–56).

[8] The discharge is accomplished by power equipment, and takes two and one half to three minutes per ton (A. 16–17).

2. In October 1973, the Union requested recognition as the representative of the drivers. Bernard Lewis, the president of Bayside and Poultry Processing, recognized the Union on behalf of Bayside and began contract negotiations. However, after several negotiating sessions, the Company broke off bargaining. Lewis informed a Union representative that the Company believed it was not obligated to bargain further because the drivers were agricultural employees and hence were not covered by the National Labor Relations Act (Pet. App. A–10 to A–11).

B. THE BOARD'S DECISION

The Board, adopting the decision of its Administrative Law Judge, found that Bayside and Poultry Processing were a single employer for purposes of the Act, and that, taken together, they "constitute a multifaceted organization whose enterprises and purposes go far beyond the bounds of traditional farming" (Pet. App. A–18). The Board further found that the operation of the Company's feed mill was not farming within the meaning of the definition in Section 3(f) of the FLSA, and that the work of the feed truck drivers was incident to the operation of that mill (Pet. App. A–18 to A–19).

The Board found that the feed truck drivers are not "agricultural laborers," that they constitute an appropriate unit for purposes of collective bargain-

ing, and that the Company violated Section 8(a) (5) and (1) of the Act by refusing to bargain with the Union which was the representative of the drivers. It issued an appropriate remedial order. (Pet. App. A–7 to A–8, A–20 to A–22.)

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals enforced the Board's order. It found that "the bulk of the capital and personnel of the Company is devoted to the feed mill and processing plant operations, which are concededly not farming" (Pet. App. A–4). Although the Company "does operate chick hatcheries and breeding farms which do constitute farming," in respect to "the raising of chickens to maturity, the actual farming activity is done by the contract farmers" (*ibid.*). The feed truck drivers are not agricultural laborers, the court held, because they are not employed in work incidental to the Company's own farming operations, but rather perform duties which are part of a "feed delivery system" which functions as "a separate organization" (Pet. App. A–4 to A–5).

SUMMARY OF ARGUMENT

I

The National Labor Relations Act does not apply to "any individual employed as an agricultural laborer," as defined in Section 3(f) of the Fair Labor Standards Act, which defines "agriculture" to include "farming in all its branches and any practices * * * performed by a farmer or on a farm as an incident

to, or in conjunction with, such farming operations, including preparation for market." The work performed by the feed truck drivers whose status is at issue here does not come within either the "primary" branch of this exemption, covering actual farming operations, such as the cultivation of crops or the raising of poultry, or the "secondary" branch, comprising "any practices" performed either "by a farmer or on a farm, incidently to or in conjunction with 'such' farming operations." See *Farmers Reservoir & Irrigation Co.* v. *McComb,* 337 U.S. 755, 762–763.

II

1. It is well settled that, in order to constitute "practices * * * performed by a farmer * * * as an incident to, or in conjunction with such farming operations," the work in question must relate to the farming operations of the employer claiming the exemption, as distinguished from the farming operations of other farmers. The Company's farming operations are limited to its hatcheries and breeder farms and do not include the operations on the 119 contract farms where the independent growers raise the Company's poultry.

The Company's contrary contention relies on decisions by the Fifth, Eighth, and Ninth Circuits holding that, in similar contract farming relationships, the farming operations of the growers are the operations of the contracting company which owns the poultry. But these decisions are inconsistent with

an interpretive ruling by the Department of Labor (29 C.F.R. 780.126) and with court decisions dealing with contract farming arrangements for the production of other agricultural and horticultural commodities. Furthermore, the cases on which the Company relies oversimplify or misconceive important elements of the contract farming relationship, such as the division of risk of loss and the existence of supervisory services. In the present case, the relationship between the Company and its growers indicates that the growers are independent contractors rather than agents or employees of the Company and that the Company is not the "farmer" raising the poultry. This conclusion is also consistent with the legislative history of a 1966 amendment of the FLSA relating to the agricultural exemption, which indicates that Congress considers the growers, and not the integrated poultry producers with which they contract, to be the farm unit.

2. Since the Company's farming is limited to its hatcheries and breeder farms, the feed delivery operation is not "part of the [Company's] agricultural venture" (see *Maneja* v. *Waialua Agricultural Co., Ltd.*, 349 U.S. 254, 264–265), and the drivers are not performing practices incident to the Company's farming operations. Less than twenty percent of the Company's workforce is involved in its actual farming operations: the Company's business, in the aggregate, is not farming. The record shows that the drivers in question have relatively little contact with the

small farming segment of the enterprise, and that they are supervised by individuals at the Company's feed mill, which supplies feed to farms other than those which the Company owns and operates.

III

The drivers are not within the other half of the secondary branch of the agricultural exemption, since they do not perform work "on a farm as an incident to, or in conjunction with such farming operations". The legislative history of that portion of the definition of agriculture in Section 3(f) of the Fair Labor Standards Act reveals that Congress wished to exempt work, such as the threshing of wheat, which is performed substantially, if not entirely, on a farm by an employee of a company performing a specialized agricultural function and which is carried out as part of actual farming operations, even though not performed by the farmer or his employees. The delivery of supplies such as poultry feed to a farmer is essentially the final phase of a separately organized manufacturing operation.

Moreover, the most significant portion of the drivers' work takes place off the farm, and thus is not done "on a farm". Since the National Labor Relations Act covers workers whose work is substantially nonagricultural, even though they perform some agricultural work, the drivers' on-farm work is not in any event sufficient to bring them within the agricultural exemption.

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220-043—76——3

ARGUMENT

TRUCK DRIVERS WHO TRANSPORT FEED FROM THEIR EMPLOYER'S MILL TO INDEPENDENT FARMS WHICH UNDER CONTRACT WITH THE EMPLOYER RAISE POULTRY HATCHED IN HIS HATCHERY FACILITIES ARE EMPLOYEES, RATHER THAN AGRICULTURAL LABORERS, AND THUS ARE COVERED UNDER THE NATIONAL LABOR RELATIONS ACT

A. INTRODUCTION

Section 2(3) of the National Labor Relations Act provides that the term "employee" shall exclude "any individual employed as an agricultural laborer." Since 1946, the appropriation acts for the Board have carried a rider which provides that the term "agricultural laborer" shall be defined in accordance with Section 3(f) of the Fair Labor Standards Act ("FLSA").[9] Section 3(f) of the FLSA defines the term agriculture in pertinent part as follows:

[9] As one court has observed, "The 1946 rider was the product of heated debate and of sharp conflict between the two houses, which unfortunately sheds relatively little light on its interpretation." *National Labor Relations Board* v. *Kelly Brothers Nurseries, Inc.*, 341 F. 2d 433, 435 n. 2 (C.A. 2). However, it is noteworthy that the version offered by Congressman Elliott, which the House first adopted, would have defined "agricultural labor" as it was defined in the Social Security Act Amendments of 1939, 53 Stat. 1377. 92 Cong. Rec. 6689–6692 (1946). (A modified version of that provision is now codified in 42 U.S.C. 410(f).) As Senator McCarran later reported, however, the House and the Senate "were in complete disagreement * * * on what is known as the Elliott rider," and the conference committee finally agreed to substitute a provision referring to the definition of agriculture in Section 3(f) of the FLSA. 92 Cong. Rec. 9514 (1946). Senator Ball, a member of the conference committee, characterized the definition of "agricultural laborer" in the Social Security Act as "very broad" and the FLSA section as "a much narrower definition" to which counsel for the National Labor Relations Board had no real objection because only "a few minor changes in [the Board's] present procedure and definition" would be called for. *Ibid.*

The language of the state statutes construed in two cases relied upon by the Company (Br. 13) is virtually identical to language of the "broad" definition incorporated in the Elliott rider which the Senate rejected. See *Etchechoury* v. *Avi-Simplot, Inc.*, 93 Idaho 438, 462 P. 2d 737, 739; *Maplewood Poultry Co.* v. *Maine Employment Security Comm'n*, 151 Me. 467, 121 A. 2d 360, 361–363.

> "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil * * * the raising of livestock, bees, fur-bearing animals, or poultry, and any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

As this Court noted in *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755, 762–763, this definition has "two distinct branches." The "primary" branch—"farming in all its branches"—includes actual farming operations such as the raising of produce from the soil or the raising of poultry; and the "secondary" branch includes "any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidently to or in conjunction with 'such' farming operations" (*ibid.*).

Petitioners properly concede (Br. 6) that the feed truck drivers do not perform work that would bring them within the "primary" branch of the agricultural exemption, *i.e.*, that delivering truckloads of poultry

feed from a mill is not equivalent to raising poultry. Accordingly, petitioners must satisfy the "secondary" branch of the definition by showing that those drivers perform work by a farmer or on a farm, and also that the work is an incident to or in conjunction with the farming operations involved. As we show below, neither of these tests is met.

B. THE DRIVERS' DUTIES DO NOT CONSTITUTE PRACTICES PERFORMED BY A FARMER AS AN INCIDENT TO OR IN CONJUNCTION WITH HIS FARMING OPERATIONS

From the earliest days of the FLSA the Wage and Hour Division of the Department of Labor, which is responsible for administering the statute, and the courts have construed the phrase "practices * * * performed by a farmer * * * as an incident to, or in conjunction with, such farming operations" to refer to practices related to the farming operations of the farmer claiming the exemption, as distinct from the farming operations of other farmers. *Waldo Rohnert Co.* v. *National Labor Relations Board,* 322 F. 2d 46, 48–49 (C.A. 9); *Mitchell* v. *Hunt,* 263 F. 2d 913, 916–917 (C.A. 5), quoting from Department of Labor Interpretive Bulletin No. 14, para. 10(f) (August 1939), 1940 WHM 185; *National Labor Relations Board* v. *Olaa Sugar Co.,* 242 F. 2d 714, 718 (C.A. 9); *Bowie* v. *Gonzalez,* 117 F. 2d 11, 18 (C.A. 1), cited with approval in *Farmers Reservoir & Irrigation Co.* v. *McComb, supra,* 337 U.S. at 766–767 n. 15; Department of Labor Interpretive Bulletin, 29 C.F.R. 780.137.

Indeed, the Company (Br. 11–12) concedes this point. Thus, the thrust of its argument (Br. 6, 7–10)

is that the raising of poultry on the contract farms is part of its own operations and that the duties of the truck drivers are performed as an incident to or in conjunction with this poultry raising. Stated otherwise, it is the Company's contention that the poultry feed delivery operation is a subordinate part of the Company's agriculture venture—that venture being defined to include the raising of poultry by the growers on the contract farms.

We submit that the Board and the court of appeals properly found, to the contrary, that the Company's farming operations were limited to its own breeder farms and hatcheries, and that the duties of the truck drivers were practices incident to the operation of the Company's feed mill rather than to its farming operations. Cf. *Maneja* v. *Waialua Agricultural Co., Ltd.,* 349 U.S. 254, 263, 265.

1. The independent growers, not the Company, raise the poultry on the contract farms

The Company contracts with growers to raise its chickens in the growers' facilities located on the growers' farms. This operation is connected at one end to the Company's hatcheries and feed mill and at the other end to the Company's processing plant where the poultry is slaughtered and dressed for sale. In 1961, the Wage and Hour Division of the Department of Labor issued an interpretive bulletin concerning the status of such arrangements under Section 3(f) of the FLSA (26 Fed. Reg. 10386), and the interpretation is still adhered to by that agency in

substantially the same form. The interpretation presently states (29 C.F.R. 780.126):

§ 780.126 Contract arrangements for raising poultry.

> Feed dealers and processors sometimes enter into contractual arrangements with farmers under which the latter agree to raise to marketable size baby chicks supplied by the former who also undertake to furnish all the required feed and possibly additional items. Typically, the feed dealer or processor retains title to the chickens until they are sold. Under such an arrangement, the activities of the farmers and their employees in raising the poultry are clearly within section 3(f). The activities of the feed dealer or processor, on the other hand, are not "raising of poultry" and employees engaged in them cannot be considered agricultural employees on that ground. Employees of the feed dealer or processor who performs work on a farm as an incident to or in conjunction with the raising of poultry on the farm are employed in "secondary" agriculture (see §§ 780.-137 *et seq.*, [explaining that work must be performed in connection with the farmer-employer's own farming to qualify as "secondary" agriculture by a farmer] and *Johnston* v. *Cotton Producers Assn.*, 244 F. 2d 53).[10]

An interpretation such as this—made by the agency responsible for administering the statute in question—is "entitled to great weight." *United States* v. *American Trucking Assn.*, 310 U.S. 534, 549. As this

[10] In Section C, *infra*, we show that the truck drivers are not employed in "secondary" agriculture by virtue of the fact that part of their work is performed on the growers' farms.

Court has observed, interpretations of the FLSA by the Department of Labor, ' while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140. Both the court of appeals (Pet. App. A–4 n. 4), and the Board thus properly relied on this interpretation."[11]

However, the administering agency's conclusion that contractors like the Company are not themselves engaged in the raising of poultry has been rejected by the Fifth, Eighth, and Ninth Circuits in decisions relied upon by the Company (Br. 8–10, 19). *National Labor Relations Board* v. *Ryckebosch, Inc.*, 471 F. 2d 20 (C.A. 9); *National Labor Relations Board* v. *Strain Poultry Farms, Inc.*, 405 F. 2d 1025 (C.A. 5); *Wirtz* v. *Tyson's Poultry, Inc.*, 355 F. 2d 255 (C.A. 8).[12] As

[11] The Board's decision does not cite the interpretation, but it relies on an earlier Board decision, *McElrath Poultry Co., Inc.*, 206 NLRB 354, enforcement denied, 494 F. 2d 518 (C.A. 5), in which the interpretation is cited (206 NLRB at 355 n. 4).

[12] *Tyson's*, the earliest of these decisions, is not flatly inconsistent with the Labor Department's interpretation, since the contracting arrangement there was somewhat different from the one described in the interpretation: the contractor placed laying hens with growers for the production of eggs, which were then handled, cooled, graded, candled, and packed by the contractor's employees (who were found to be agricultural laborers). Moreover, as one state court has pointed out, only 27 percent of the eggs handled by the contractors' employees were produced by the growers; the remaining 73 percent came from the contractor's own farms. *Fors Farms, Inc.* v. *Washington State Employment Security Dept.*, 75 Wash. 2d 383, 450 P. 2d 973, 977. However, *Strain*, *supra*, which

we show below, the Company's contention, based on these authorities, that it is engaged in the raising of poultry by virtue of its arrangements with the contract growers is inconsistent with court decisions dealing with contract farming arrangements for the production of other agricultural and horticultural commodities, and it misconceives the contract farming relationship.

a. The division of risk between the grower and the Company indicates that the grower, not the Company, is the farming unit

The Company (Br. 8–10), tracking the rationale of *Tyson's, supra,* 355 F. 2d at 260, and *Strain, supra,* 405 F. 2d at 1033, stresses that it retains title to the chickens from the day they are hatched to the time they are sold as processed broilers. The Company does not—nor can it properly—contend that continuing ownership of the poultry itself suffices to make the Company a farmer, for the courts have generally rejected this proposition.[13]

involved a contractor-feed dealer like those described in the interpretation, relied and elaborated upon the *Tyson's* rationale; and *Ryckebosch, supra,* in which the poultry contractor owned not only a feed mill, but also a processing plant and a few farms of its own (see *Victor Ryckebosch, Inc.*, 189 NLRB 40, 41–42), relied on *Strain* without substantial discussion. The Fifth Circuit subsequently relied on *Strain in Abbott Farms, Inc.* v. *National Labor Relations Board*, 487 F. 2d 904, and on *Abbott Farms* in *McElrath Poultry Co., Inc.* v. *National Labor Relations Board*, 494 F. 2d 518. Neither decision turns on the extent of integration of the poultry contractor involved, although the court in *Abbott* noted that the contractor there owned no processing plant.

[13] *Waldo Rohnert Co.* v. *National Labor Relations Board, supra,* 322 F. 2d at 47 (seed mill company not a farmer by virtue of its contracts with farmers to grow vegetable seed crops using company-supplied seed, even though the company retained legal title to the growing crops and seed); *Wirtz* v. *Jackson & Perkins Co.*, 312 F. 2d 48 (C.A. 2) (contractor not a farmer although it provided understock to growers raising plants for the contractor's nursery business); *Mitchell* v. *Huntsville Wholesale Nurseries, Inc.*, 267 F. 2d 286, 289 n. 2 (C.A. 5) (contractor not a farmer by virtue of its agreements with growers which provided "crop to be property of Huntsville at all times"). See also *Parks* v. *Federal Crop Insurance Corp.*, 416 F. 2d 833 (C.A. 7) (farmers who grew corn from hybrid seed corn furnished by contractor that retained legal title to portion of crops were the actual producers of all the corn under a provision of the Federal Crop Insurance Act, 7 U.S.C. 1508(c)); *Elm Spring Farm* v. *United States*, 127 F. 2d 920 (C.A. 1) (milk handling corporation that held title to dairy cows tended by farmers not a milk producer within the meaning of orders issued under the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246).

The Company instead asserts (Br. 9), again reflecting the analysis in *Tyson's, supra,* 355 F. 2d at 259–61 and *Strain, supra,* 405 F. 2d at 1031, 1033, that, under its contracts with the growers, ownership of the poultry carries with it the entire risk of loss in the farming operations, whereas in the cases in which the contracting company was held not to be a farmer, "the farm product had to be marketable, saleable, or acceptable to the company and thus the risk of loss fell on the farmer." In addition, the Company argues (Br. 9–10), citing *Strain,* that, in a contract relationship like the one it maintains with its growers, the contractor, and not the growers, "assumes the risk of market fluctuations which affect the price of the birds." Both of these arguments represent a considerable over-simplification of the economic realities.

The grower bears a substantial share of the risk of loss. He is able to enter into contracts with the

Company only after making a sizeable investment in land, poultry housing facilities, and related equipment."[14] Moreover, in carrying out his obligations under the contract, the grower incurs expenses not reimbursed by the Company under the contract. Thus, the grower pays the wages of any hired hands, the interest on any mortgage payments on the farm, any taxes other than local taxes on birds, and all maintenance and repair costs of his facilities and equipment (Pet. App. A–28).

While a grower is guaranteed a certain minimum payment based on square footage of his facilities supplied for housing the flock, he has no assurance that this fee will exceed his costs in any given contract period, much less that he will recover his original investment in land and farm facilities. Moreover, if for any reason the grower loses his farm, he is out of business, whereas the Company can simply switch to another contract grower or contract with the new owner of the farm for the raising of poultry. As

[14] The growers' combined investment probably exceeds that of the Company. A 1967 report issued by the U.S. Department of Agriculture stated that studies of broiler production in New England showed that for an annual output of 19.76 million birds, the investment of the growers would be approximately 6.4 million dollars, while the investment of the integrator (*i.e.*, the poultry contractor) in its hatchery, feed mill and processing operation would be about 2.3 million dollars. Because of "the large investment required," the report noted, "most integrators have not invested greatly in growout operations." U.S.D.A., Packers and Stockyards Administration, *The Broiler Industry: An Economic Study of Structure, Practices and Problems* (1967), p. 13 and Appendix 3. See also the description of grower investment in Arkansas, *id.* at 14, n. 13.

the First Circuit noted in *Elm Spring Farm* v. *United States, supra,* 127 F. 2d at 927:

> [The company] might have become a producer by acquiring a farm and milk cows and going into the business of operating a dairy farm with the attendant risks of loss. "It chose to employ the scheme in question here. It considered it advantageous to avoid the risks of production and now must bear the burdens of a determination that other entities than itself are the producers." *Gray* v. *Powell,* 1941, 314 U.S. 402, 414, 62 S. Ct. 326, 86 L. Ed —.

The growers in the present case have significant risks of loss related to market shifts and to factors influencing the number and size of the chickens at maturity. Since the contracts between growers and the Company remain in effect only for such successive flocks "as may be placed by mutual agreement" (Pet. App. A–23), the Company is free to negotiate new terms, including the amount of the fixed fee, before placing a new flock. Thus, the rates negotiated will normally reflect market shifts in poultry prices; while the effects on the growers of market shifts may be delayed, they are not eliminated. See B. W. Marion and H. B. Arthur, *Dynamic Factors in Vertical Commodity Systems: A Case Study of the Broiler System,* (Ohio Agricultural Research and Development Center, 1973), p. 44.

Although there is no specific contract condition requiring that the full-grown chickens be acceptable to the Company, that omission does not mean that the Company bears the full risk of loss from factors af-

fecting the survival and weight of the chickens. A grower's compensation includes, in addition to the square footage guarantee, a bonus payment based in part on the weight of the poultry raised to maturity; the compensation can be calculated only after a given flock has been weighed and taken to the processing plant. Thus, the grower is necessarily affected by anything which reduces the weight or number of chickens still alive at the end of the grow-out period.[15]

In short, although some risks have been shifted from the grower to the Company under the contract governing their relationship, the grower still is subject to the turns of fortune which have always affected those who invest their capital in farmland and their labor in farming. Accordingly, the grower, and not the Company, remains the farmer for purposes of the agricultural exemption.

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[15] The contract does guarantee the grower a prorated payment in the event of certain calamities (Pet. App. A–27):

"* * * the payment will be prorated on the basis of average mortality within a settlement, original flock density, and actual percentage salvaged when excessive bird losses resulted from:

"a) An act of God (including, but not limited to, fire, winds, snow, or flooding).

"b) OR, over 4% in excess of the average die as a result of lack of oxygen and/or heat exhaustion."

While the grower thus receives at least some payment in these circumstances, it is obviously less than he would receive had all the chickens lived to maturity. In other words, the loss in such circumstances is shared by grower and contractor. This provision does not cover mortality resulting from poultry diseases; the Company's general manager explained (A. 30–31) that, although the Company volunteered to absorb losses resulting from an epidemic of laryngotracheitis occuring shortly before the Board hearing, it was not obligated to do so under the contract.

b. The other factors in the relationship between the growers and the Company indicate the growers are independent farmers

Even if this Court were to conclude, contrary to the foregoing, that the risk of loss in the poultry-raising venture had been shifted to the Company, it would not necessarily follow that the Company was raising the poultry on the contract farms. Another important factor to be considered is the nature of the relationship between the growers and the Company—whether the growers are the agents or employees of the Company rather than independent contractors. *Mitchell* v. *Huntsville Wholesale Nurseries, Inc., supra,* 267 F. 2d at 291.

The Company (Br. 10) does not appear to be claiming that the growers and their hired hands are its employees;[16] it contends only that "[w]hether you define the relationship as an agency, subcontractor, or in substance as a lease by the company of the farm, equipment, and labor (A. 12), the elements of entrepreneurship have been shifted by contractual agreement from the farmer to the contractor company".

Although the Company provides some supervision of the growers,[17] the record shows that it is not the

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[16] Indeed, the agreements explicitly state that they are not (Pet. App. A–28).

[17] The contract provides that the grower will "follow instructions of the Bayside Supervisor in the care and management of Broiler, Roaster or Capon flocks" and will permit the Company's personnel to enter "any facility pertinent to this contract at reasonable times" (Pet. App. A–26 to A–27). The Company also determines the composition of the feed supplied to the farms and the scheduling of deliveries and provides certain disease-prevention and other services.

kind of supervision generally associated with an employer-employee relationship. Thus, the Company's general manager testified (A. 13) that the four field supervisors, or poultry servicemen, "called periodically on these farms on a routine basis *or* on a basis as the grower feels that he has a problem and needs their attention" (emphasis added). This suggests that some of the growers may encourage regular visits while others are content to call in the servicemen only in emergencies, such as conditions indicating the possible presence of disease. The existence of such supervision and auxiliary services has generally been held inadequate to show that the contractor is in fact engaged in farming.[18]

The legislative history of Section 203(a)(6) of the Fair Labor Standards Amendments of 1966, 80 Stat. 833, 29 U.S.C. 213(a)(6) establishes that Congress viewed growers for integrated poultry producers such as petitioners as independent contractors, and thus that the growers, not the integrated producers, are the

[18] *Waldo Rohnert Co.* v. *National Labor Relations Board*, *supra*, 322 F. 2d at 47 (contractor "given right to and does supervise the planting, inspects the growing crops * * * (removing undesirable plants) and decides when to irrigate * * *, when to weed, spray and finally when to harvest"); *Mitchell* v. *Huntsville Wholesale Nurseries, Inc.*, *supra*, 267 F. 2d at 289 n. 2 (the crops were "under [the contractor's] supervision as to the best methods of planting, production, digging, grading, packing, and shipping"); *Mitchell* v. *Hertzke*, 234 F. 2d 183, 190 (C.A. 10) (contractor determined "time and conditions of the planting [of bean crops], the conditions under which the beans were to be raised," and the time for harvesting). See also *Parks* v. *Federal Crop Insurance Corp.*, *supra*, 416 F. 2d at 835 (contractor agreed to furnish to corn growers "a man to supervise the planting of the seed").

farmers for purposes of that Section. It strongly suggests the same conclusion under the related Section 3(f), 29 U.S.C. 203(f), involved here.

Section 203(a) exempts "any employee employed in agriculture" from the minimum wage provisions of the FLSA under certain conditions. In explaining the effect of this exemption on farmers who contract with integrated poultry producers, Senator Yarborough, the floor manager of the bill, confirmed his questioner's belief in the continued applicability of "the traditional tests that have heretofore been applied under the Act in determining whether an independent contractor or an employee relationship exists" between the grower and the company, under which the grower—and not the company—was the agricultural employer affected by the exemption. Senator Yarborough specifically identified the tests involved as those contained in the committee report. (112 Cong. Rec. 20819–20820 (1966).)

That report, S. Rep. No. 1487, 89th Cong., 2d Sess. (1966), relies on *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, noting that "the total situation controls" in determining whether individuals are employees or independent contractors (S. Rep. No. 1487, *supra*, at 11).[19] The report (*ibid.*) lists the following factors,

[19] This is consistent with the Board's test for determining independent contractor status. See *National Labor Relations Board* v. *United Insurance Co.*, 390 U.S. 254, 258; *National Labor Relations Board* v. *Deaton, Inc.*, 502 F. 2d 1221, 1223–1224 (C.A. 5), certiorari denied, 422 U.S. 1047.

derived from *Rutherford* (331 U.S. at 730), to be considered:

> (1) The extent to which the services rendered are an integral part of the principal's business;
> (2) The permanency of the relationship;
> (3) The opportunities for profit or loss;
> (4) The initiative, judgment, or foresight exercised by the one who performs the services;
> (4) The amount of investments; and
> (6) The degree of control which the principal has in the situation.

The fact that the legislative history of Section 203(a) identifies these factors as the "traditional tests" for distinguishing between employees of farmers and independent contractors is strong evidence that they were also intended to apply in making the same distinction under Section 3(f) of the same statute.

The first factor is, in a broad sense, a statement of the ultimate issue; but in the context of *Rutherford,* where the individuals found to be employees were meat boners who "did a specialty job on the production line" in the employer's slaughtering plant (331 U.S. at 730) it could be viewed as a factor weighing against employee status for the growers and their helpers. Although the raising of the poultry is essential to the Company's business and the supplies and services furnished by the Company are necessary to the growers, the growers' work is scarcely an integral part of the Company's operation comparable to a single operation on an assembly line.

With respect to "the permanency of the relationship," the contracts are in effect only for a particular

grow-out period of seven to nine weeks and may be extended only "by mutual agreement." As shown (pp. 21–24, *supra*), the growers do have "opportunities for profit or loss"; and insofar as their total compensation depends on their bonus payments, which are in turn dependent on how many pounds of poultry they have produed by the end of the grow-out period, it is incumbent upon them to exercise "initiative, judgment, or foresight." Indeed, the Company's General Manager testified (A. 31) that the contract was designed so that "in a normal operating situation with normal mortalities, [a grower's] income would be influenced by his capabilities."

As already discussed, the growers have considerable amounts invested in the poultry raising, since they must furnish the farms, facilities, and labor.[20] Finally, although the contract enables the Company to exercise some supervision of operations, it is not the kind of close daily supervision over details of work which would be typical of an employer-employee relationship (see pp. 25–26 *supra*), and there is no evidence to suggest the Company has a voice in hiring or firing a grower's farmhands. Thus, the degree of control maintained by the principal is not such as to deprive the growers of independent contractor status.

In the light of all of the circumstances, the growers are independent contractors, as the legislative history referred to above indicates Congress understood to be

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[20] In contrast, in *Rutherford*, *supra*, 331 U.S. at 725, the meat boner's investment was limited to the cost of a hook on which to hang the meat, a knife, a knife sharpener, and a leather apron.

the case for typical contract growers in the broiler industry.

2. The Company's feed delivery operation is not a subordinate part of its farming operations

Although the Company is not engaged in the raising of poultry on the contract farms, it does, as the Board found, engage in some farming operations coming within the primary branch of Section 3(f) of the FLSA.[21] However, under the tests of *Maneja* v. *Waialua Agricultural Co., Ltd., supra,* 349 U.S. at 264–265, the feed delivery operation is not "part of [the Company's] agricultural venture" and the Board properly found that feed truck drivers do not perform duties incident to that venture.

[21] In discussing the Company's character as a vertically integrated poultry enterprise (Br. 10–19), the Company misconceives the Board's position and the reasoning of the court of appeals. Although the Board (Pet. App. A–18) found that "Bayside and Poultry Processing constitute a multifaceted organization whose enterprises and purposes go far beyond the bounds of traditional farming," it was not concerned, as the Company asserts (Br. 13), with the Company's "motivation," nor was it seeking, as the Company suggests (Br. 18–19), to place the entire organization "in the commerce column" or hold it to be entirely "non-agricultural." Rather the Board found, and the court agreed, that the Company consists of a number of different operations, some of which are agricultural and some of which are not—in other words, the organization *as a whole* was not placed in any "column" (Pet. App. A–4, A–18). The Board further found, and the court agreed, that the feed mill and feed delivery operations were not among the Company's farming operations and that they were not incident to any of the operations which were. In reaching that conclusion, it was appropriate, contrary to the Company's assertion (Br. 19), to look at each of the Company's components in order to determine the size of the nonfarming operations relative to that of the farming operations and to determine the relationship between the work of the employees in question and the farming operations. *Maneja* v. *Waialua Agricultural Co., supra,* 349 U.S. at 264–265.

In *Waialua,* this Court held that, in determining whether a particular operation is incident to or in conjunction with farming, it is necessary to consider all of the facts, including the seven criteria developed by the Wage-Hour Administrator (349 U.S. at 264–265):

> (a) The size of the ordinary farming operations. * * *
>
> (b) The type of product resulting from the operation in question. * * *
>
> (c) The investment in the processing operation as opposed to the ordinary farming activities. * * *
>
> (d) The time spent in processing and in ordinary farming. * * *
>
> (e) The extent to which ordinary farmworkers do processing. * * *
>
> (f) The degree of separation by the employer between the various operations. * * *
>
> (g) The degree of industrialization.

These criteria indicate that the operation of the feed mill is not incidental to the Company's farming operations, and that the feed delivery is incidental to the feed mill, and not the farming operations.

The ordinary farming operations of the Company are only a small part of its total enterprise. The Company owns and operates approximately six breeder farms and two hatcheries, a commercial hatchery and

a pedigree hatchery.[22] There are no more than 80 employees of these breeder farms and hatcheries, whereas the feed mill and processing plant employ more than 400 persons (A. 17, 60–62).[23] Since less than twenty per cent of the Company's workforce is engaged in actual farming operations, the Board (Pet. App. A–17) properly rejected the Company's claim that its operations, in the aggregate, constituted farming.

Nor do the other factors specified in *Waialua, supra,* indicate that the processing of the feed is incidental to the company's agricultural operations. The feed mill operation is separate from the ordinary farming operations; the mill itself is leased from the company that built it (A. 26–27), and is evidently operated by employees who have no ordinary agricultural duties (A. 18, 45).[24] Its function is to transform purchased ingredients—some of them, such as drugs and soybean meal, already in a manufactured state—into a manufactured agricultural product in a variety of forms (A. 14–15, 70). The mill produces about 120,000 tons of feed a year, and sells about a third of that to an unrelated company (A. 26). The production of feed is thus a typical industrial operation. *Maneja* v. *Waialua Agricultural Co., Ltd., supra,* 349 U.S. at 264–265; *Mitchell* v. *Budd,* 350 U.S. 473; 481–482; *Holtville Alfalfa Mills* v. *Wyatt,* 230 F. 2d 398, 403 (C.A. 9).

The feed delivery is the final step in the feed production process, and is thus incidental to the feed mill operation, not to the Company's farming operations. The feed mill drivers have very little contact with the Company's hatcheries and breeder farms. Most of the

[22] The six breeder farms are connected to the pedigree hatchery. The record indicates (A. 11) that there are eleven farms associated with the commercial hatchery, but the Company apparently does not own them. The Company did not specifically except to the Administrative Law Judge's finding that it owned and operated "two hatcheries and six primary breeding farms," and it asserted in its fact statement filed with the Board (A. 67) that "Bayside itself owns approximately seven farms ([Tr.] 130, 30) all of which at the present time are being used for the parent-grandparent operation ([Tr.] 133–34)." In its brief to the court of appeals (p. 2), the Company mentioned only the hatcheries, the 119 contract farms, and "six or seven company-owned farms (used for breeding)."

[23] The Company's Exhibit 5, a list of employees carried on the payroll of Bayside, the parent corporation (A. 60–62), has 80 names, but they include those of the Company's General Manager and the feed truck drivers and their dispatcher who, as shown below, have very little to do with the Company's own farms.

[24] Poultry farmers apparently ordinarily have not operated their own feed mills. A publication describing the Maine poultry industry during the 1960's notes that, before 1963, "three-fourths of the manufactured feed was shipped in from out-of-state plants." F. D. Reed, *The Maine Poultry Industry: Its Impact, Growth and Competitive Position* (Univ. of Maine, Cooperative Extension Service, Circular 394, Rev. July 1970), p. 9. Because of a change in rail rates in 1964 and because of "certain developments in milling technology," it became more advantageous to use feed mills within the state, so that, as of December 31, 1969, approximately "85 to 90 percent of the feed" consumed by Maine poultry was manufactured in the state (*id.*, Foreword and pp. 9–10). At this same time there were "13 commercial feed mills manufacturing poultry feeds" and only "a half-dozen small farm mills manufacturing feed for home use" (*id.* at 10), while there were then 737 broiler farms in the state (*id.* at 11; see also Tr. 75–76).

feed deliveries to the breeder farms are made by drivers working for the KLF feed mill rather than by the Company's drivers (A. 25). There is no exchange of duties between the feed truck drivers and the Company's farm employees. Instead, the drivers' duties in addition to loading their trucks and delivering feed to the contract farms are related solely to the feed mill operation; as shown (pp. 8–9, *supra*), the drivers sometimes transport feed ingredients to the mill from places as distant as Gloucester, Massachusetts.

The drivers report to the mill for work and return there when deliveries are completed to wash down their trucks. See *Vives* v. *Serralles*, 145 F. 2d 552, 555 (C.A. 1); *Calaf* v. *Gonzalez*, 127 F. 2d 934, 937 (C.A. 1). They are supervised by a dispatcher at the mill, and, although the dispatcher consults with the Company's broiler department manager—whose responsibilities include the supervision of the growers (A. 40–41)—regarding feed composition and scheduling, the dispatcher's "day-to-day" supervisor is, as he testified (A. 47), Merle Weymouth, the assistant manager of the feed mill, who is in charge of mixing the feed (A. 45, 47). Moreover, the undisputed testimony of a former Company feed truck driver shows that Weymouth hired and fired the drivers (A. 52–53, 58–59).[25]

In sum, the Company's farming operations constitute only a small proportion of its total enterprise,

[25] Although the drivers and the dispatcher were carried on the payroll of Bayside, the parent corporation (A. 60–62), Weymouth was identified as an employee of the subsidiary, Poultry Processing, which operated the mill (A. 32).

and the feed truck drivers do not perform work "incident to or in conjunction with" those operations, but instead work in conjunction with the independent feed production operation. The delivery of feed to the contract farms is not part of the Company's "agricultural venture."

C. THE DRIVERS DO NOT PERFORM WORK ON A FARM AS AN INCIDENT TO OR IN CONJUNCTION WITH FARMING OPERATIONS WITHIN THE MEANING OF THE FLSA AGRICULTURAL EXEMPTION

Neither petitioners nor the cases upon which they rely have suggested that the truck drivers' work might be within the secondary branch of the definition of agriculture in Section 3(f) on the theory that it involves "practices * * * on a farm as an incident to, or in conjunction with, such farming operations." Although the drivers' work requires them to spend some time daily on the growers' farms, that fact does not suffice to bring them within this part of the definition. This is so because first, the work the drivers perform on the farm is not of the type contemplated by this part of the definition, and second, in any event, the drivers are not "on the farm" for most of their working hours.[26]

[26] At least one court in addition to the court below has evidently concluded that the requirement that the agricultural work must be incidental to the *employer's* farming operations (*supra*, p. 16) applies to work claimed to be exempt because performed "on a farm" as well as to that performed "by a farmer." See *National Labor Relations Board* v. *Olaa Sugar Company*, 242 F. 2d 714, 718 (C.A. #9); Pet. App. A–3.

1. The delivery of supplies is not work "on a farm" within the agricultural exemption

As this Court observed in *Farmers Reservoir & Irrigation Co.* v. *McComb, supra,* 337 U.S. at 767, the secondary branch of the definition of agriculture in Section 3(f) as originally proposed would have included only "practices * * * performed by a farmer as an incident to, or in conjunction with, such farming operations * * *." On an amendment offered by Senator McGill, the phrase "or on a farm" was inserted immediately following "by a farmer." 81 Cong. Rec. 7888 (1937). The concern prompting the amendment, as this Court noted (337 U.S. at 767), was that the definition of agriculture would otherwise not cover "the threshing of wheat or other functions necessary to the farmer if those functions were not performed by the farmer and his hands, but by separate companies *organized for and devoted solely to that particular job*" (emphasis supplied).[27]

[27] The following colloquy, quoted by the Court, 337 U.S. at 767 n. 16, took place between Senators Tydings and Borah (Senator Borah was a member of the Senate Committee on Education and Labor which reported out S. 2475, eventually enacted into law as the FLSA):

"Mr. Tydings. * * * In the case I visualize * * * the farmer is not performing the service. The man to whom I refer makes a business of doing nothing but threshing. He owns his own machine, and hauls it from farm to farm, and enters into contracts with farmers to thresh their crops; the point being that while he is dealing with an agricultural commodity, he is not necessarily a farmer, and he is not doing work ordinarily done by a farmer.

"Mr. Borah. He is doing the exact work which the farmer did before he took it up.

"Mr. Tydings. That is true, but I do not think the bill is drawn in sufficient detail to bring the man to whom I refer under its provisions of exemption." (81 Cong. Rec. 7653 (1937).)

See also the comments of Senator Bone, *id.* at 7659, and the colloquy between Senators McGill, George and Black, *id.* at 7888.

Thus, the practices performed "on a farm" to which the exemption was intended to refer are activities, such as threshing, performed substantially, if not entirely, on a farm by employees of a company providing specialized agricultural services, and carried out as part of a traditional farming activity, such as harvesting. Accordingly, the Wage and Hour Division of the Department of Labor has issued the following interpretation of "employment in practices on farm" (29 C.F.R. 780.136):

> § 780.136 Employment in practices on a farm.
>
> Employees engaged in building terraces or threshing wheat and other grain, employees engaged in the erection of silos and granaries, employees engaged in digging wells or building dams for farm ponds, employees engaged in inspecting and culling flocks of poultry, and pilots and flagmen engaged in the aerial dusting and spraying of crops are examples of the types of employees of independent contractors who may be considered employed in practices performed "on a farm". Whether such employees are engaged in "agriculture" depends, of course, on whether the practices are performed as an incident to or in conjunction with the farming operations on the particular farm, as discussed in §§ 780.141–780.147; that is, whether they are carried on as a part of the agricultural function or as a separately orga-

nized productive activity (§§ 780.104–780.144). Even though an employee may work on several farms during a workweek, he is regarded as employed "on a farm" for the entire workweek if his work on each farm pertains solely to farming operations on that farm. The fact that a minor and incidental part of the work of such an employee occurs off the farm will not affect this conclusion. Thus, an employee may spend a small amount of time within the workweek in transporting necessary equipment for work to be done on farms. Field employees of a canner or processor of farm products who work on farms during the planting and growing season where they supervise the planting operations and consult with the grower on problems of cultivation are employed in practices performed "on a farm" so long as such work is done entirely on farms save for an incidental amount of reporting to their employer's plant. Other employees of the above employers employed away from the farm would not come within Section 3(f). For example, airport employees such as mechanics, loaders, and officer workers employed by a crop dusting firm would not be agriculture employees [citations omitted].

The decisions on the status of activities allegedly exempt by reason of being "practices performed on a farm" as an incident to farming operations have been consistent with this interpretation. See, *e.g., Boyls* v. *Wirtz,* 352 F. 2d 63 (C.A. 5) (pilot and flagman engaged in aerial crop dusting within the exemption, but not their off-farm support personnel); *Holtville*

Alfalfa Mills v. *Wyatt, supra,* 230 F. 2d at 402–403 (remanded on theory that transportation of chopped alfalfa from field to mill by drivers who did not handle product at mill but returned immediately to field with empty trucks would be exempt as on-the-farm activity only if factual findings showed that transportation was actually a continuous part of harvesting); *Tipton* v. *Associated Milk Producers, Inc.,* 398 F. Supp. 743 (N.D. Tex.) (employees who installed and repaired milk cooling equipment on farms are within the exemption where off-farm work was only occasional, minor, and incidental). But see *Wirtz* v. *Osceola Farms Co.,* 372 F. 2d 584, 589 (C.A. 5) (exemption applied to drivers employed by sugar mill to transport farm laborers to farm of independent growers and to bring meals to the laborers during harvesting).

By contrast to the types of activities exempt under the principles set forth above, the delivery of supplies such as poultry feed to a farmer is essentially the final phase of the operation by which supplies are produced and distributed, rather than an incident of the poultry-feeding process.[28] This distinction is

[28] The situation might be different if, for example, the drivers had significant responsibilities for the care of the chickens or even for assuring the proper operation of the feeding equipment. Instead, although they take certain precautions on the farms to avoid spreading disease or spoiling the feed, they have no direct contact with the poultry and are no more involved in actual farm activities than truck drivers who took care to avoid causing fires when delivering crude oil to oil refineries would be involved in oil refining.

reflected in the language of Section 3(f). In defining the practices included in the secondary branch of agriculture, Congress specifically identified "delivery to storage or to market or to carriers for transportation to market." Such deliveries of farm products are the final phase of the agricultural venture. On the other hand, the delivery of supplies to the farm is the final phase of their production. And the off-farm production of such supplies is a separately organized nonagricultural function, even when the supplies are essential to farming.[29] Their distribution to farms is hardly akin to wheat threshing, even if a portion of the activity takes place on the farm.

Thus, in *Johnston* v. *Cotton Producers Assn.*, 244 F. 2d 553 (C.A. 5), in which the employee in question worked for an organization which, like the Company, placed its chicks on contract growers' farms to be raised into broilers, the court held (*id.* at 555) that the empolyee's work in supervising the growing of the chicks and catching and cooping them for market was, to the extent done on the farms, within the agricultural exemption of the FLSA. However, the same employee's work in "hauling a load of fertilizer from the car in which it was shipped from outside the state to a farmer customer" was "in connection with and incidental to a retail sale" (*ibid.*) and

[29] See, *e.g.*, *Wirtz* v. *Ti Ti Peat Humus Co.*, 373 F. 2d 209, 213 (C.A. 4), certiorari denied, 389 U.S. 834 (production of peat moss used as a soil conditioner and fertilizer); *McComb* v. *Super-A Fertilizer Works, Inc.*, 165 F. 2d 824, 828 (C.A. 1) (production of fertilizer), cited with approval in *Farmers Reservoir & Irrigation Co.* v. *McComb*, *supra*, 337 U.S. at 761.

thus within the retail establishment exemption, not the agricultural exemption, of the FLSA. In the present case, there is no formal retail sale of poultry feed because the feed cost is simply figured into the formula by which the grower's total compensation is calculated; nevertheless, the Board's finding (Pet. App. A–19) that the delivery of the feed was incident to the feed milling operation is analogous to the finding in *Johnston* that the delivery was incident to the sale.

Nor is *Farmers Reservoir & Irrigation Co.* v. *McComb, supra,* authority for the view that a simple supply function, like the feed mill drivers', is within the agricultural exemption. There this Court indicated (337 U.S. at 766) that the work of employees of a company that collects, stores and distributes irrigation water would be exempt as "a practice performed as an incident to or in conjunction with farming" if performed by a farmer or on a farm. This is because irrigation of the farm itself, as opposed to simply delivering water to floodgates at the edges of the farm, would result in the actual watering of crops.[30] The exemption of the irrigation workers would not follow because, like the truck drivers here, they simply delivered supplies to the farm. The fact that the truck drivers, unlike the irrigation workers, must enter the

[30] The Court emphasized this distinction in concluding that the irrigation workers were not farmers: "the responsibility of the company's employees ceases when they so release the water. The water is supplied to the farmer at the head gates and he takes it over there and uses it, in his own laterals as he sees fit, to irrigate his crops" (*id.* at 763).

farm in order to make their deliveries, does not suffice to bring the basic delivery function within the exemption.

2. The driver's work is not substantially performed "on a farm"

Even if the truck drivers' deliveries to the growers are considered to be incidental to the growers' farming operations, the drivers are not working "on the farm" in any substantial sense. Their on-farm work is instead simply incidental to their main job, both in terms of importance and of the time consumed. They are drivers, not feed bin loaders—their primary function is to transport the feed to the growers, and that function cannot be performed on a farm. See 29 C.F.R. 780.134.[31] Moreover, they are physically on a farm for only one-half to one hour at a time, or a total of one and a half to four hours out of the usual nine-hour work day (A. 21, 54, 57–58). Thus, most of their work time is not spent on a farm, and is not within the agricultural exemption.

Originally, the Board declined to assert jurisdiction over employees who regularly spend part of their time in agricultural work. See *Clinton Foods, Inc.*, 108 NLRB 85; *National Labor Relations Board* v. *Olaa Sugar Company, supra,* 242 F. 2d at 719–721.

[31] In contrast, in *Wirtz* v. *Lyon Flying Service*, 16 WH Cases 414 (W.D. La.), the agricultural exemption applied to employees of a crop dusting company who drove with fertilizers and insecticides from the company office to farms where they spent the day loading the crop dusting planes, returning to the office at the end of the day to wash their trucks. In that case, the employees were loaders, not drivers; their on-farm work was more significant than their transportation responsibilities.

The Board has, however, formally abandoned the *Clinton Foods* doctrine, and now follows the rule that the National Labor Relations Act covers employees who regularly perform non-agricultural work, in addition to some agricultural work. *H. A. Rider & Sons,* 117 NLRB 517; *Olaa Sugar Company,* 118 NLRB 1442, 1443 (on remand from *National Labor Relations Board* v. *Olaa Sugar, supra*).[32] This rule was disapproved in *National Labor Relations Board* v. *Kelly Brothers Nurseries, Inc.,* 341 F. 2d 433 (C.A. 2) when applied to bring within the coverage of the Act employees spending more than eighty-five percent of their time in agricultural work. But the court emphasized the soundness of a rule which would cover employees whose work was substantially non-agricultural.

In *Kelly Brothers,* the objection was simply that the "small proportions (of non-agricultural work) are inadequate to tip the scales in favor of bringing these men, who would be regarded as farmers on any realistic view, within the National Labor Relations

[32] It is settled that the exemptions to the Fair Labor Standards Act, including the agricultural exemption, are not applicable if the workweek includes any nonexempt work at all. Thus, *Mitchell* v. *Hunt*, 263 F. 2d 913 (C.A. 5) held that the FSLA applied to all work of empoyees who worked in admittedly exempt farming operations every day of the week, but worked at the farmer's auction barn on Saturday, where he sold livestock of other farmers as well as his own. Accord, *Hodgson* v. *Wittenburg*, 464 F. 2d 1219, 1220–21 (C.A. 5); *Hearnsberger* v. *Gillespie*, 435 F. 2d 926, 930 (C.A. 8); *Wirtz* v. *Von Carstedt*, 362 F. 2d 67, 69–70 (C.A. 9); *Tobin* v. *Blue Channel Corp.*, 198 F. 2d 245, 248 (C.A. 4); *Wabash Radio Corp.* v. *Walling*, 162 F. 2d 391, 394 (C.A. 6); 29 C.F.R. 780.11.

Act" (*id.* at 439).[33] Here the converse situation exists: the small proportions of their agricultural work are inadequate to bring the feed truck drivers, who would not be regarded as farmers on any realistic view, within the agricultural exemption to the Act.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[33] Recent Board decisions involving the mixed work rule are essentially consistent with this reasoning. See, *e.g.*, *Aquaculture Research Corp.*, 215 NLRB No. 1, 87 LRRM 1496 (jurisdiction asserted where agricultural and nonagricultural work intermixed and nonagricultural work was substantial); *Light's Tree Co.*, 194 NLRB 229 (jurisdiction not asserted where ninety per cent of total worktime was spent in agricultural work).

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